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# LIABILITY OF MASTER FOR WILFUL OR MALICIOUS ACTS OF SERVANT.

## II.

§ 23. MASTER'S LIABILITY FOR MALICIOUS ACTS IN OTHER CASES. —Returning now to the general question of the master's liability for malicious acts in cases not affected by any such special considerations as those which have just been considered, it may be premised, as has been already stated, that the tendency of the modern cases is undeniably to attach less importance to the motive with which the act was done and to give more attention to the question whether or not it can be deemed to fall within the scope of the servant's employment.

§ 24. SAME SUBJECT—ILLUSTRATIONS.—The scope of the rulings upon this subject can be best illustrated by some selections from the adjudicated cases. Thus in a leading case in New York,[44] in which the older and more rigid rule was adhered to, it appeared that a son while driving his father's horses and wagon about his father's business, seeing some boys attempting to get into the wagon, whipped up his horses and the wagon ran over one of the boys who was seen to be between the wheels when the horses were started. An action was brought against the father and the son jointly to recover damages, and a verdict rendered against them both. But COWEN, J., said: "It is impossible to sustain this verdict against the father. It is difficult to infer from the evidence, anything short of a design in Stephen (the son), to throw the plaintiff's boy from the wagon; and the judge, as I understand the charge, told the jury that the defendants were jointly liable in that view. If Stephen, in whipping the horses, acted with the wilful intention to throw the plaintiff's boy off, it was a plain trespass, and nothing but a trespass, for

[44] Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

which the master of Stephen is no more liable than if his servant had committed any other assault and battery. All the cases agree that a master is not liable for the wilful mischief of his servant, *though he be at the time, in other respects, engaged in the service of the former.*[45] Why is the master chargeable for the act of his servant? Because what a man does by another he does by himself. The act is within the scope of the agency. 'A master is not answerable,' says Mr. Hammond, 'for every act of his servant's life, but only for those done in his relative capacity. To charge the master, it must always be shown or presumed, that the relation of master and servant subsisted between them in the particular affair. If the master is liable under other circumstances, he is so, not *quatenus* master, but as any one would be who instigates an injury.' *The dividing line is the wilfulness of the act.* If the servant make a careless mistake of commission or omission, the law holds it to be the master's business negligently done. It is of the very nature of business that it may be well or ill done. We frequently speak of a cautious or careless driver in another's employment. Either may be in the pursuit of his master's business, and negligence in servants is so common, that the law will hold the master to the consequences as a thing that he is bound to foresee and provide against. But it is different with a wilful act of mischief. To subject the master in such a case, it must be proved that he actually assented, for the law will not imply assent. In the particular affair, there is, then, no longer the presumed relation of master and servant. The distinction seems to resolve itself into a question of evidence."

§ 25. ———. The rule here announced by Judge COWEN is undoubtedly that laid down by the older cases.[46] But the better and more modern rule clearly is that the mere nature of the act is not the only criterion, but that the most important test is whether the act was done in the course of the employment. Thus RYAN, C. J., says: "We cannot help thinking that there has been some useless subtlety in the books in the application of the rule *respondeat super-*

[45] Citing 1 Chit. Pl. 69; McManus v. Crickett, 1 East 106; Hammond on Parties 83; Croft v. Alison, 4 Barn. & Ald. 590; 1 Chit. Gen. Pr. 80; Bowcher v. Noidstrom, 1 Taunt. 568.

[46] McManus v. Crickett, 1 East, 106; Ellis v. Turner, 8 T. R. 531; Middleton v. Fowler, 1 Salk. 282; Croft v. Alison, 4 B. & Ald. 590; Bowcher v. Noidstrom, 1 Taunt. 568. See also Tuller v. Voght, 13 Ill. 278; Brown v. Purviance, 2 H. & G. (Md.) 316; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Church v. Mansfield, 20 Conn. 284; Thames Steamboat Co. v. Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154; Bard v. Yohn. 26 Penn. St. 482; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; State v. Morris, &c. Ry. Co., 3 Zab. (N. J.) 360; Illinois Cent. R. R. Co. v. Downey, 18 Ill. 259; Evansville, &c., Ry. Co. v. Baum, 26 Ind. 70; New Orleans, &c., Ry. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356; Wesson v. Seaboard, &c., R. Co., 49 N. C. 379.

*ior,* and some unnecessary confusion in the liability of principals for wilful and malicious acts of agents. This has probably arisen from too broad an application of the *dictum* of Lord HOLT, that 'no master is chargeable with the acts of his servant but when he acts in the execution of the authority given to him, and the act of the servant is the act of the master.'[47] For this would seem to go to excuse the master for the negligence as well as for the malice of his servant. One employing another in good faith to do his lawful work would be as little likely to authorize negligence as malice; and either would be equally *dehors* the employment. Strictly, the act of the servant would not, in either case, be the act of the master. It is true that so great an authority as Lord KENYON denies this, in the leading case of *McManus* v. *Crickett,*[48] which has been so extensively followed; and again, in *Ellis* v. *Turner,*[49] distinguishes between the negligence and the wilfulness of the one act of the agent, holding the principal for the negligence but not for the wilfulness. It is a singular comment on these subtleties, that *McManus* v. *Crickett* appears to rest on *Middleton* v. *Fowler,* the only adjudged case cited to support it; and that *Middleton* v. *Fowler* was not a case of malice, but of negligence, Lord HOLT holding the master in that case not liable for the negligence of his servant, in such circumstances as no court could now doubt the master's liability. In spite of all the learned subtleties of so many cases, the true distinction ought to rest, it appears to us, on the condition whether or not the act of the servant be in the course of his employment." [50]

§ 26. ———. In accordance with the rule laid down in the case last above referred to, it has been held in a great variety of cases of more recent origin, that the master is liable for the wanton or malicious acts of his servant if they were committed while the servant was acting in the execution of his authority and within the scope of his employment.[51] When this has been said, however, the

[47] Middleton v. Fowler, 1 Salk. 282.

[48] 1 East 106, supra.

[49] 8 Term Rep. 531.

[50] Craker v. Chicago & Northwestern Ry. Co., 36 Wis. 657, 17 Am. Rep. 504. See also Redding v. South Carolina R. R. Co., 3 S. C. 1, 16 Am. Rep. 681.

[51] St. Louis, etc., Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105. Baltimore Consol. Ry. Co. v. Pierce, 89 Md. 495, 43 Atl. 940; Aiken v. Holyoke St. Ry. Co., 184 Mass. 269, 68 N. E. 238; Chicago, etc., Ry. Co. v. Kerr, 74 Neb. 1, 104 N. W. 49; Mott v. Consumers' Ice Co., 73 N. Y. 543; Magar v. Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. 1038; Jackson v. Telegraph Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; Stranahan Co. v. Coit, 55 Ohio St. 398; 45 N. E. 634, 4 L. R. A. (N. S.) 506; Nelson Business College Co. v. Lloyd, 60 Ohio St. 448, 54 N. E. 471, 71 Am. St. Rep. 729, 46 L. R. A. 314; Ploof v. Putnam, — Vt. — 75 Atl. 277; Western Un. Tel. Co. v. Cattell, 100 C. C. A. 489, 177 Fed. 71.

problem is by no means solved, for the difficult question always remains as to what acts may be deemed to be within the scope of his employment within the meaning of this rule. As in the case already considered of the master's liability for the negligent acts of his servant, it is impossible to lay down any hard and fast rule by which this question can be determined. In many cases no better definition can be given than the words themselves suggest. But in general terms it may be said that an act is within the scope of the employment if it be done while the servant was engaged upon the master's business and if the act was done, however mistakenly, or ill-advisedly, with a view to further the master's interests, or if it arose from some sudden impulse or emotion which grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account.

§ 27. ———. In dealing with this question of motive, the time and circumstances of its origin may often be significant. Thus if the alleged wilfulness or malice arose out of the aggravations, annoyances or conflicts of the attempted performance of the master's service, it is vastly easier to see that the act resulting from it was still an act within the scope of the employment, than it is where the motive arose at a time when the servant was not engaged in the employment, and did not owe its origin to any attempt at performance, but was the personal and private malice or ill-will of the servant which the exigencies of the service did not create but merely furnished an opportunity for its expression or satisfaction.

§ 28. ———. It does not by any means follow, from this rule, that the master is liable for *any* wilful or malicious act of his servant, even though it be committed during the time in which the servant is generally engaged upon the execution of his employment. It is not merely a question of time but is a matter of incident and relation. The act must be done not only while the servant is acting within the exercise of his authority, but it must also be within the scope of the employment as already explained. At the same time, it is not to be inferred that the master's liability depends upon whether he has or has not intentionally authorized the doing of the wrongful act. If he has done so, he is of course liable. The question is rather, as has been explained, whether the act was an incident to, an outgrowth of, an ingredient in, the execution of the service which the master confided to the servant. If that be the character of the act, the master is liable though the act were done wilfully or maliciously. If, on the other hand, the servant stepped aside from his employment to do some act having no connection with his mas-

ter's business, and to which he was inspired by his own private malice or ill-will, the master is not liable.[52]

§ 29. ———. An excellent illustration of the principles here involved is furnished by the English case of *Limpus* v. *London General Omnibus Company*,[53] wherein the question was very carefully considered and in which there was some difference of opinion. The facts as stated by one of the judges who held the defendants not liable, and whose statement presents the facts in the strongest light against the plaintiff, were as follows: "It appears by the evidence in this case that the defendants were the proprietors of an omnibus plying between the Bank and Hounslow, which at the time in question was driven by a coachman in their service; that whilst upon the road, in the course of his employment to drive defendants' omnibus from Piccadilly to Kensington, he wilfully and on purpose, and contrary to the express orders of the defendants, wrongfully endeavored to hinder and obstruct the passage along the road of another omnibus belonging to the plaintiff; and for that purpose, he, who was ahead of the plaintiff's omnibus 80 or 100 yards, slackened his pace, until the plaintiff's omnibus came up to him and was about to pass, and he then purposely pulled across the road in order to prevent and obstruct his progress, and in so doing ran against one

[52] Louisville, etc., R. Co. v. Routt, 25 Ky. L. Rep. 887.

In Greb v. Pennsylvania Ry. Co., 41 Pa. Super. Ct. 61, a passenger after he had gotten off the train on which he had been a passenger and stepped onto the platform, was assaulted, without provocation, by the conductor of the train. Held: That an instruction that defendant was liable was erroneous. Also that there was no liability under the general duty to protect.

In Collins v. Butler, 83 App. Div. (N. Y.) 12, 81 N. Y. Supp. 1074, a clerk in a store became unreasonably enraged at a woman customer who was seeking to buy some apples that had been placarded in the store-windows, swore at her, threatened to "kick her out" of the store, and did violently push and thrust her into the street. It was held that the employer was liable, as a matter of law, for the act of the clerk.

[53] 1 H. & C. 526. In the course of his opinion in this case, Willes, J., said:

"But there is another construction to be put upon the act of the servant in driving across the other omnibus; he wanted to get before it. That was an act done in the course of his employment. He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not consistent with his employment, when explained by his desire to get before the other omnibus. I do not speak without authority when I treat that as the proper test. Take the ordinary case of a master of a vessel, who it must be assumed is instructed not to do what is unlawful but what is lawful, if he has distinct instructions not to sell a cargo under any circumstances, but he does so under circumstances consistent with his duty to his master, the master is liable in damages to the person whose goods are sold."

See also Curley v. Electric Vehicle Co., 68 App. Div. 18, 74 N. Y. Supp. 35, where the plaintiff's cab-driver moved into a line drawn up at a cab-stand ahead of his regular "turn." The defendant's driver, who probably was entitled to the desirable location preempted by the plaintiff's driver, after asking plaintiff's driver to yield the position, cut in ahead of plaintiff's cab with an electric cab and backed into plaintiff's horse and injured him. **The defendant company was held liable for the injury.**

of the plaintiff's horses with his (the defendants') omnibus, thereby causing considerable damage. The reason assigned by the defendants' coachman for this wrongful proceeding was that he pulled across the plaintiff's coachman to keep him from passing, in order to serve him (the plaintiff's coachman) as he had served him (the defendants' coachman)."

§ 30. ———. A verdict for the plaintiff having been rendered, judgment was affirmed by a majority of the judges in the Exchequer Chamber, one judge dissenting. The position of the majority is shown by the following extract from the opinion of BLACKBURN, J.: "The defendants' servant was the driver of an omnibus, and as such it was his duty, not only to conduct it from one terminus to another, but to use it for the purpose of picking up traffic during the course of the journey. He drove across another omnibus under circumstances from which the jury might have thought that it was done for the purpose of wreaking his spite against the driver of that omnibus. The learned judge, having to tell the jury what was the test by which they were to determine whether the act was done in the course of the service or not, used language in which he tells them, perfectly rightly, that if the act was done in the course of the service the defendants were responsible; and he goes on to say, 'that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant.' No doubt what Mr. MELLISH said is correct: it is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damages resulting from the wilful act of the footman in taking charge of the horses. But, in this case, I think the direction given to the jury was a sufficient guide to enable them to say whether the particular act was done in the course of the employment."

§ 31. ———. Many other illustrations of these principles are furnished by recent cases. Thus where the master was the proprietor of a business college and had in his employment a servant whose duty it was to clean the rooms at the close of the day, and this involved the moving of the tables for that purpose, it appeared that

on a certain day the plaintiff had been called in to repair an electric light in one of the rooms. In order to reach the light he had placed a ladder upon one of the tables in the room. It was at the close of the day and the janitor was engaged in cleaning the room. This involved the moving of the table on which the ladder stood. He sought to move the table in order to go on with his work. The plaintiff remonstrated and urged that the table be left as a support to the ladder until the plaintiff had completed the repairs. An altercation followed and the janitor, becoming impatient, went on with his work of cleaning, pushed the table aside and thereby threw the plaintiff to the floor, causing the injuries for which he sought damages from the master. The defendant contended "that the janitor by reason of his ill-will toward the plaintiff, was actuated wholly by malice, and violently shoved the table, not in the performance of any duty within his employment, but with the wilful purpose only of injuring the plaintiff." The court, however, held that it was a fair inference from the evidence that the moving of the table, under the circumstances was an act within the scope of the employment, and that it was error for the trial court to direct a verdict for the defendant.[54]

§ 32. ———. In another case in the same court, it appeared that the defendant was under contract to supply and deliver milk to the plaintiff's creamery; that the defendant had in his emploment a servant who assisted in preparing the milk and delivering it to the plaintiff, and that this servant, as was contended, maliciously and to gratify ill-will which he had toward the defendant (although the defendant was ignorant of it) fouled and adulterated the milk which he delivered to the plaintiff, thereby causing plaintiff the injury for which recovery was sought. The trial court instructed the jury that if this was the case, the defendant was not liable. A verdict and judgment for the defendant under this instruction was reversed by the Supreme Court upon several grounds, one of which, pertinent here, was that the jury might fairly find that the servant's act in adulterating the milk, which it was his duty to prepare and deliver, was an act within the scope of his employment.[55] It will be observed that in this case, contrary to the usual facts, the alleged malice of the servant existed against his employer and not against the plaintiff.

§ 33. ———. In another case it appeared that the defendant, a telegraph company, had a squad of men at work erecting wires under the charge of the company's servant. It was desired to erect

[54] Nelson Business College Co. v. Lloyd, 60 Ohio St. 448, 54 N. E. 471, 71 Am. St. Rep. 729, 46, L. R. A. 314.

[55] Stranahan Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. (N. S.) 506.

the wires across the plaintiff's land. The plaintiff objected and offered forcible resistance. In order to get the plaintiff out of the way, the servant in charge of the work lodged a complaint against the plaintiff before a local magistrate and caused him to be arrested and taken from the scene of action. While he was thus absent, the work was hastily completed. Upon the hearing of the complaint, the magistrate found that it was "frivolous and malicious" and discharged the plaintiff. The plaintiff sued the telegraph company for false imprisonment and malicious prosecution. It was held to be a question for the jury whether the servant, in causing the plaintiff's arrest, was performing his master's business or was engaged in some pursuit of his own. The jury found that the defendant's servant "caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way so that its agents and servants might erect telephone and telegraph poles on his land." The court said: "If this is not an act done in the course of the employment and in furtherance of the master's business, for his benefit and advantage, it would be hard to conceive of one which would come under that class."[56]

Many other cases in which the master was held liable are cited in the notes.[57]

§ 34. ———. Even under the most extreme statement of the modern rule, however, there are many cases in which the master will not be liable. As has been already stated, it is not enough that the act be done while the servant was generally acting in the execution of his authority but the act complained of must be an act within the scope of the employment. As was pointed out in a preceding section, this is not merely a question of time but of incident and relation. As is stated in a recent case it seems sometimes to be assumed "that an act done by a servant while engaged in the master's work is necessarily an act done within the scope of the former's employ-

[56] Jackson v. Telegraph Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

[57] St. Louis, etc., Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105 (night-watchman of railroad wantonly shooting an unresisting and harmless trespasser); Chicago, etc., Ry. Co. v. Kerr, 74 Neb. 1, 104 N. W. 49, (where a conductor threw a boy, who was stealing a ride, under the train, after the boy had left the train in obedience to the conductor's command); Mott v. Consumers' Ice Co., 73 N. Y. 543, (driver of ice-wagon purposely drove into plaintiff; court held fact it was a wilful act did not exclude all presumption of liability; it was still a question for the jury whether he was executing his authority); Magar v. Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038, (a poacher was shot by a watchman of a game preserve; the court held the master would be liable for a wilful, wanton or reckless injury, only if it was committed in the general scope of the watchman's employment); Aiken v. Holyoke St. Ry. Co., 184 Mass. 269, 68 N. E. 238 (a motorman wantonly started his car and injured the plaintiff, a six year old boy, who was trying to get a secure position on the front step and who was calling to the motorman to stop).

ment. But this is conspicuously a *non sequitur*. An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent, malicious, or mischevious purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense and should not be deemed to be so as a matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible."[58]

§ 35. ———. In the case from which this quotation was made it appeared that the defendant's minor son was engaged in sprinkling his father's lawn under such circumstances as to warrant the inference that in so doing he was acting as the father's servant. While so doing he turned the hose off the lawn and apparently in a spirit of mischief, threw water upon a horse, standing on the opposite side of the street, causing the horse to run away and bringing about the injury for which a recovery was sought against the father. The trial judge instructed the jury that if they should find that the boy was in the father's service, and either negligently or "from a mischievous disposition" threw the water upon the horse and thereby caused the injury, the father would be responsible. The court of errors and appeals unanimously held that this instruction was erroneous and reversed a judgment which had been rendered for the plaintiff. The court said: "If the act of the defendant's son in throwing water upon the plaintiff's horse was not the result of his careless handling of the garden hose while sprinkling his father's lawn, but was deliberately done by him purely out of a spirit of mischief, for the purpose of frightening the animal, the fact that he used the tool supplied to him for the doing of his father's work for the accomplishment of his own mischievous purpose did not make it an act within the scope of his employment and did not render the defendant liable for the injury resulting therefrom."[59]

§ 36. ———. In a recent case in Pennsylvania where damages were sought against the master for the act of his servant, a teamster, who had with his whip struck a boy who had climbed up on the side of the master's wagon while the servant was driving it upon the master's business, and had thereby caused the boy to fall beneath the

[58] Evers v. Krouse, 70 N. J. L. 653, 58 Atl. 181, 66 L. R. A. 592. That there is a marked distinction between the liability of the master for acts done during the employment and those done within the scope of the employment, see Bowen v. Illinois Cent. R. Co., 69 C. C. A. 444, 136 Fed. 306. Compare Haehl v. Wabash Ry. Co., 119 Mo. 325, 24 S. W. 737.

[59] Evers v. Krouse, supra.

wheels, the court said it was a question for the jury to determine whether the driver did the act for the purpose of ejecting a trespasser from his master's wagon—a result which it would be both his right and his duty to accomplish and for accomplishing which, either negligently or with excessive force the master would be responsible,—or whether he struck the boy to gratify some personal feeling of his own, in which event the master would not be liable. In the language of the court: "If his act in striking the boy was intended to remove him by force from the wagon, it would be the act of his employer for which the latter would be responsible. If, on the other hand, the purpose of the driver was not to cause the boy to leave the wagon, but to inflict punishment upon him to gratify the ill-will of the driver, the defendant company is not responsible for the wrongful or tortious act. It would not be an act done by the employee in the execution of his employer's business, although it was performed while he was in the service of the employer. It would be an act of the employee directed against the boy independently of the driver's contract of service, and in no way connected with, or necessary for, the accomplishment of the purpose for which the driver was employed."[60]

§ 37. ———. In another case the master, a railroad company, was sought to be held liable for the alleged act of the conductor and other train-men in forcibly putting a man upon the train against his will and carrying him away. The act, if done at all, was done while the servants were acting generally in the execution of their authority. But it was held that the act, if done, would not be an act within the scope of the employment. "If a conductor," said the court, "knowingly and wilfully participates in the act of taking and transporting upon the cars, against his will, one whom he had no right to receive on the cars for transportation, he and not the company, would be liable for his conduct. The master is not liable for the criminal acts of his servant, not authorized or sanctioned by him nor 'for his acts of wilful and malicious trespass'."[61]

Other similar cases are cited in the note.[62]

§ 38. ———. FALSE IMPRISONMENT AND UNAUTHORIZED ARREST.—The liability of the master for false imprisonment or unau-

[60] Brennan v. Merchant & Co., 205 Pa. St. 258, 54 Atl. 891.

In a later case, almost identical in its facts, the court held the master liable on the first ground: Hyman v. Tilton, 208 Pa. 641, 57 Atl. 1124.

[61] Jackson v. St. Louis, etc., Ry. Co., 87 Mo. 422, 56 Am. Rep. 460.

[62] Thus in Lynch v. Florida, etc., Rr. Co., 113 Ga. 1105, 39 S. 411, the railroad company was held not responsible for a personal assault made by its station agent during a personal encounter between the plaintiff and a station agent which grew out of the provoking conduct of the plaintiff even though the original ground of controversy arose out of matters connected with the railroad company's business.

thorized arrest must also depend upon the circumstances of each case. A person may be employed as, for example, a detective, for the express purpose of bringing about an arrest or imprisonment.[63] Even though authority to arrest was not expressly given it may arise by implication, as an incident of some other employment. Thus watchmen, private policemen or private detectives are not infrequently employed by railroad and steamboat companies, theaters and department store companies and the like, for the purpose of protecting property, preventing crime and apprehending offenders.[64] It is not uncommon, in such cases, for the persons so appointed to be also commissioned by the state or the municipality as public policemen or detectives.[65] Power to arrest and imprison in such cases may

[63] Pennsylvania Co. v. Weedle, 100 Ind. 138; Evansville, etc., R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; American Express Co. v. Patterson, 73 Ind. 430; Duggan v. Baltimore, etc., R. Co., 159 Pa. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Kastner v. Long Island R. Co., 76 App. Div. 323, 78 N. Y. Supp. 469.

[64] A private railroad detective was authorized to make arrests only on consultation with attorneys, unless the proof was clear and the necessity urgent. Without consulting any one he caused the arrest of plaintiff for passing counterfeit money. The charge being groundless, it was held that the defendant company was liable for the false arrest: Eichengreen v. Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702.

[65] It is often difficult in these cases to determine whether what was done was done as servant of the master or as public officer for the public good. The mere fact that the servant was also a public officer will not relieve the master from liability. Nor does the fact that the public officer was also a servant impose such liability. It seems to be a question of fact in each case. If what was done was done as servant and for the protection of the master's property the master would be liable. See Baltimore, etc., Ry. Co. v. Ennalls, 108 Md. 75, 69 Atl. 638, 16 L. R. A. (N. S.) 1100; Tolchester Beach Imp. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846; Deck v. Baltimore, etc., Ry. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399; Baltimore, etc., R. Co. v. Deck, 102 Md. 669, 62 Atl. 958; Baltimore, etc., R. Co. v. Twilley, 106 Md. 445, 67 Atl. 265; Tolchester Beach Imp. Co. v. Scharnagl, 105 Md. 199, 65 Atl. 916; Clark v. Starin, 47 Hun (N. Y.) 345; King v. Ill. Cent. R. Co., 69 Miss. 245, 10 South. 42; Union Depot Co. v. Smith, 16 Colo. 361, 27 Pac. 329; Wells v. Washington Market Co., 8 Mackey (D. C.) 385; Norfolk, etc., R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935; Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. R. 440, 24 L. R. A. 483, 488; Tyson v. Bauland Co., 186 N. Y. 397, 79 N. E. 3, 9 L. R. A. (N. S.) 267; Sharp v. Erie Ry. Co. 184 N. Y. 100, 76 N. E. 923, 6 Am. & Eng. Ann. Cas. 250; Brill v. Eddy, 115 Mo. 596, 22 S. W. 488; Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540; Tucker v. Erie Ry. Co., 69 N. J. Law 19, 54 Atl. 557; Cordner v. Railway Co., 72 N. H. 413, 57 Atl. 234; Foster v. Grand Rapids Ry. Co., 140 Mich. 689, 104 N. W. 380; Thomas v. Can. Pac. R. R. Co., 14 Ont. L. Rep. 55, 8 Am. and Eng. Ann. Cas. 324; McKain v. Baltimore & O. R. Co., 65 W. Va. 233, 64 S. E. 18.

In St. Louis, etc., Ry. Co. v. Hudson (Ark.), 130 S. W. 534, there was a statute authorizing conductors on trains to act as peace officers in arresting drunken persons. The Court instructed that if the conductor erred in thinking plaintiff drunk the company was liable. Held: Erroneous. The company is not liable if the conductor reasonably and bona fide believed plaintiff to be drunk.

In St. Louis, etc., R. Co. v. Morrow, 88 Ark. 583, 115 S. W. 173, a town marshal was furnished with a pass over appellant's railroad, in return for which the marshal was to give particular protection to the railroad property. The marshal, in arresting a tramp who was stealing a ride on the appellant's train shot and wounded him. The court thought it

often be expressly given, but where it is not it may often be regarded as a fair incident and the employer will be liable for its wrongful exercise. Ticket agents and gatemen of railroads, steamboats, theaters, and the like, may be expressly or by implication authorized to arrest or detain persons attempting to pass without paying fare or having the proper ticket;[66] "floorwalkers," managers of stores, and others similarly situated may be found to be expressly or by implication, authorized to apprehend, detain or give into custody persons guilty of "shop-lifting" and other similar offenses.[67] Conductors

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doubtful whether there was evidence sufficient to establish the relation of master and servant; that there was evidence warranting a finding that the marshal was acting in the discharge of his public duty, and that the jury should have been instructed that if they should so find, the appellant was not liable.

[66] A ticket agent who follows a woman out upon the platform of an elevated railway structure and there accuses her of passing counterfeit money, slanders her character, lays hands upon her and detains her for some time, is acting within the scope of his employment so as to render the company liable. Palmeri v. Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136.

The conductor of a passenger train refused to accept plaintiff's ticket and demanded cash fare. Some difficulty ensued and the conductor caused the plaintiff to be arrested and taken from the train at the next town. The company was held liable for the false arrest. Atchison, etc., R. Co. v. Henry, 55 Kan. 715, 41 Pac. 952, 29 L. R .A. 465. See also Palmer v. Maine Central R. Co., 92 Me. 399, 42 Atl. 800, 44 L. R. A. 673; Lynch v. Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141; Krulevitz v. Eastern R. Co., 143 Mass. 228, 9 N. E. 613; Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 78 S. W. 1055; Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303.

In a case where the agent of an express company instituted criminal proceedings against consignees who had obtained a package without paying the charges, it was held that if he did this as a means of collecting the money for his principal the latter was liable: but not, if the purpose was simply to punish the offender: Cameron v. Pacific Express Co., 48 Mo. App. 99.

But where a ticket agent directed the arrest of one who he thought had attempted to rob the till, he was held to be acting without the scope of his authority: his authority being limited to the protection of his principal's property, and as the attempt of plaintiff to rob the till had been completed, and without success, his arrest was not an act of protection but of punishment, for which the defendant was not liable; Allen v. London, etc., R. Co., L. R. 6 Q. B. 65.

[67] Where a saleswoman mistakenly thought she saw a customer steal lace, and reported it immediately to the floorwalker, who arrested and searched her, the employer was held liable. Knowles v. Bullene & Co., 71 Mo. App. 341.

A clerk was temporarily left in charge of a small store. Erroneously thinking he discovered a customer stealing silverware he detained her and sent for a police officer who searched her. The court held the employer liable. Staples v. Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824 (disapproving Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448). Mallach v. Ridley, 43 Hun (N. Y.) 336, follows Mali v. Lord, supra. In Gearity v. Strasbourger, 133 N. Y. App. Div. 701, a saleswoman in a department store falsely reported to the manager that the plaintiff had stolen goods. The manager took plaintiff to one of the proprietors, called a police officer and with the acquiescence of the proprietor caused plaintiff's arrest. Held, that both manager and proprietor were liable.

Where a floor-walker, for the purpose of extortion, arrested a woman and accused her of theft when he knew she had not stolen anything, the employer is not liable. Cobb v. Simon, 124 Wis. 467, 102 N. W. 891.

In Smith v. Munch, 65 Minn. 256, 68 N. W. 19, the plaintiff was a striker who created some disturbance in and about the factory of the Bohn Mfg. Co., at the noon-hour on a

and other similar agents on trains and boats, door-keepers at theaters, and the like, have often implied if not express authority to arrest and give into custody persons misbehaving themselves upon the employers' premises or vehicles.[68] Many other similar cases will at once suggest themselves.

In all these cases the master will be liable if the servant, while acting within the scope of his master's business and not solely for his own ends or purposes, makes an arrest or causes an imprisonment, even though the servant acted upon insufficient evidence or with mistaken zeal or even in direct disregard of the precautionary instructions which had been given him by the master.[69]

§ 39. ———. Where however no express authority to arrest has been given and it cannot be regarded as a legitimate incident of any power expressly given, the master will not be liable even though the servant may have caused the arrest with the mistaken notion of furthering the master's business.[70] *A fortiori* will the master not

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day subsequent to the commencement of the strike. Late in the afternoon the defendant Munch returned to the factory, and upon learning of the trouble at noon, directed a policeman to arrest the plaintiff, which was done without a warrant. Munch was the general superintendent of the company, and had charge of its premises, business, and employees. The court held the company liable for the unlawful arrest, saying, by Mitchell, J.: "This duty [of the general superintendency] impliedly included the protection of the premises and property from trespassers, and the protection of the employees, while at work, from the interference of intruders. The act of Munch in directing plaintiff's arrest was evidently not done in his own interest, or for his own benefit, but in the furtherance of the interest of the company by protecting its property and employees from wrongdoers."

[68] In Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, the conductor of the defendant had a controversy with an intoxicated passenger. He summoned a policeman to arrest the disturber, but by mistake he pointed out the wrong passenger, the plaintiff, who was in no way involved in the controversy and who was in no way misbehaving. The court held the company liable for the false arrest, as the conductor was acting on behalf of the company in directing the arrest of the plaintiff.

For cases of unauthorized arrests growing out of controversies over the payment of fare, see: Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Kelly v. Durham Traction Co., 132 N. Car. 368, 43 S. E. 923.

Proprietor of theater liable for assault and arrest of patron by doorkeeper and ticket-seller: Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506.

[69] See Pennsylvania R. Co. v. Weedle, 100 Ind. 138; Evansville, etc., R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; American Express Co. v. Patterson, 73 Ind. 430; Gillingham v. Ohio R. R. Co., 35 W. Va. 588, 14 S. E. 243; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Singer Mfg. Co. v. Rahn, 132 U. S. 518; Kastner v. Long Island R. Co., 76 App. Div. 323, 78 N. Y. Supp. 469. And other cases cited in preceding notes.

[70] An agent who is in possession of a stock of goods as agent for a chattel mortgagee in possession, has no implied authority to prosecute for perjuring a party who makes an attachment affidavit and attaches the goods. Laird v. Farwell, 60 Kan. 512, 57 Pac. 98.

An authority to arrest persons for violation of labor contracts is not incident to the employment of clerks in a commissary store maintained by the construction company whose contracts had been violated, although the authority of such clerks extended to collecting amounts due from laborers to the company. Vara v. Quigley Const. Co., 114 La. 262, 38 South. 162.

Where a master had directed a servant to exclude all persons from a certain building

be liable where the arrest or imprisonment is merely the result of the servant's own personal malice or ill-will[71] or of his, generally commendable, desire, as a citizen to bring offenders to justice.[72]

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who did not have a ticket, such direction does not authorize the servant to procure a policeman to arrest a woman who tried to force her way in without a ticket, and the master will not be liable for such arrest. Barabasz v. Kabat, 86 Md. 23, 37 Atl 720.

It is no part of a ticket agent's duty to endeavor to apprehend counterfeiters, and the company is not responsible for an unauthorized arrest where the company's interests are not concerned, as where the ticket agent deliberately takes a bill which he believes to be counterfeit in order to aid the police in the detection of counterfeiters. Mulligan v. N. Y., etc., Ry. Co., 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791. See also Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615, 27 L. R. A. 63; Gulf, etc., R. Co. v. Donahoe, 56 Tex. 162.

In Little Rock Trac. & Elec. Co. v. Walker, 65 Ark. 144, 45 S. W. 57, 40 L. R. A. 473, a street car conductor called a policeman to take off and arrest a delinquent passenger. The company was held not liable as the conductor's authority was limited to removing passengers.

In Milton v. Missouri Pac. Ry. Co., 193 Mo. 46, 91 S. W. 949, 4 L. R. A. (N. S.) 282, the defendant company employed a detective to ascertain the facts surrounding a train robbery. The detective caused the arrest of the plaintiff. The court held the defendant was not liable, as authority to ascertain facts does not imply authority to arrest persons for the purpose of ascertaining whether or not the person arrested was concerned in the robbery; (substantially similar is Murrey v. Kelso, 10 Wash. 47, 38 Pac. 879).

In Lubliner v. Tiffany & Co., 54 App. Div. 326, 66 N. Y. Supp. 659, one Hyde was the superintendent in charge of the general administration of the defendant's jewelry house. The defendant often offered rewards for jewelry lost by its customers, but another agent had in charge all matters connected with such lost jewelry, and such other agent was independent of, and not under the supervision of, the superintendent Hyde. One Pugh applied to defendant for a reward the defendant had offered. Hyde went with Pugh to the police magistrate's office and made an affidavit upon which a warrant for the arrest of plaintiff was issued. The court held that the authority of Hyde did not extend to the protection or recovery of property belonging to customers of the defendant, and that the defendant was not liable for the false arrest of the plaintiff.

In Waters v. Anthony, 20 App. Cases (Dist. of Columbia) 124, the plaintiff was arrested on the charge of having stolen an express package from the office of the Adams Express Company, where he was employed. The court found no substantial evidence from which to conclude that Waters, the clerk in charge of the Washington office, caused the arrest of the plaintiff. But if he had done so, the court said there was "not a scintilla of evidence" upon which the express company could be held liable. The authority of such an agent did not contemplate such an act as the one sought here to be held to be the act of the company.

In Hern v. Iowa State Agricultural Society, 91 Iowa 97, 58 N. W. 1092, 24 L. R. A. 655, the plaintiff was unlawfully arrested by one of the officers or agents of the defendant. The court said that inasmuch as the defendant was a public body, with representatives elected from the various counties; as it was not incorporated for pecuniary profit; as the state expressly gave its officers and agents power to arrest for two offences, and as the offence with which the plaintiff was charged was neither of those two, that the officers or agents arresting plaintiff were acting outside the scope of the powers the society could confer upon them and the defendant cannot be held therefor.

[71] If a "floor-walker" in a store knowingly makes a false charge of theft against a person and by trick attempts to sustain it, for the purpose of extortion or other unlawful personal purpose, the master is not liable; Cobb v. Simon, 124 Wis. 467, 102 N. W. 891; 119 Wis. 597, 97 N. W. 276.

[72] Arrests made or caused after the emergency is passed and merely for the purpose of punishing the offender or bringing him to justice, are not ordinarily within the scope of the employment of an agent whose duty it is to guard or protect property or to re-

§ 40. ———. Closely allied to the questions just considered and in many cases identical with them, is the question of the master's liability for unjustified prosecutions. The power to institute prosecutions may be expressly conferred, or it may be found to be within the scope of an authority conferred for some other purpose. In either event a prosecution undertaken for the purpose of furthering the master's business would, if unfounded, impose liability upon the master.[73]

Prosecutions, however, the institution of which has no legitimate relation to the master's business or which can not be deemed to be within the scope of the agent's authority;[74] and those instituted

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cover it if taken. Markley v. Snow, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685; Allen v. London, etc. Ry. Co., L. R. 6 Q. B. 65; Travis v. Standard L. & A. Ins. Co., 86 Mich. 288, 49 N. W. 140, (followed in Govaski v. Downey, 100 Mich. 429, 59 N. W. 167); Singer Mfg. Co. v. Hancock, 74 Ill. App. 556.

In Decker v. Lackawanna, etc., R. Co., 39 Pa. Super. Ct. 225, the conductor of a train telegraphed ahead to the train dispatcher that there was a crowd of disorderly persons on his train. The dispatcher telegraphed back that there would be police officers at the station when the train arrived, but that they were instructed not to arrest anyone for what he had done upon the train. When the train arrived, a police officer asked the conductor to point out the disorderly group and the conductor did so. Thereupon the officer arrested the plaintiff who was one of them. Held, that the company was not liable for this arrest.

Arrests caused by an agent to save himself from liability to master rather than to further the master's interests, do not make master liable: Larson v. Fidelity Mut. L. Assn, 71 Minn. 101, 73 N. W. 711.

[73] See Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055, (a case where the foreman of the transit company instituted a proceeding against the plaintiff for a disturbance of the peace, as the result of a controversy over an unfounded claim that the plaintiff had not paid his fare); Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303, (a case of the same general nature). But see Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615, 27 L. R. A. 63; Cameron v. Pacific Express Co., 48 Mo. App. 99, (a more questionable case, where the agent of an express company instituted criminal proceedings for the purpose of coercing payment of charges upon a package sent C. O. D. which the consignees had obtained from a boy in charge of the office without paying the charges); Lyden v. McGee, 16 Ont. 105; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 13 Pac. 609 (where the company had directed an agent to bring replevin for a machine sold, which the agent did, and then as the constable could not find it caused the plaintiff, who was the buyer's husband, to be arrested, charged with secreting the machine).

[74] In the following cases the defendant was held not liable: Govasky v. Downey, 100 Mich. 429, 59 N. W. 167, (prosecution for the theft of a railroad company's property instituted by one called a detective but no evidence given showing that the act was within the scope of his employment); Murrey v. Kelso, 10 Wash. 47, 38 Pac. 879, (where agent employed to search for property which had been lost and to take all legal steps for its recovery, instituted a prosecution for the larceny of the property); Laird v. Farwell, 60 Kan. 512, 57 Pac. 98, where an agent put in charge of goods instituted prosecution for perjury against a person who had made an affidavit in attachment proceedings wherein some of the goods in the agent's possession were seized); Springfield Engine Co. v. Green, 25 Ill. App. 106, (where the collection agent instituted prosecutions for forgery against a debtor who, as he contended, had forged an agreement giving a rebate on the claim); Atchison, etc. Ry. Co. v. Brown, 57 Kan. 785, 48 Pac. 31, (where the claim agent of a railroad company instituted prosecution for the robbing of a post-office on the

merely to punish an offender or to bring a wrong-doer to justice;[75] and those instituted merely to accomplish some purpose of the agent only;[76] and those which owe their origin wholly to the personal ill-will or malice of the agent,[77] impose no liability upon the master.

§ 41. ———. MALICIOUS PROSECUTION.—It has been seen in an earlier section[78] that there are many cases in whch the principal may be liable, as for an act within the scope of the employment, where his agent has instituted a prosecution against a third person without reasonable cause. Although these are called cases of malicious prosecution, the cause of action does not depend upon the existence of express or actual malice. The question now in hand concerns cases where such express or actual malice is involved. May the principal be held liable for a prosecution instituted because of the express and actual malice of his agent? The determination of this question seems to depend upon the same considerations as those already referred to in connection with the general subject of malicious motive. If though the agent had actual ill-will against the person prosecuted, the prosecution of that person was an act within the scope of his employment, and was instituted because it was within the scope of his employment, the principal would be liable regardless of the motive.[79] If, on the other hand, though the prosecution of some other person might be within the scope of the employment, the prosecution of this person was not, or if the prosecution of this person under some other circumstances would be within the course of his employment, the prosecution of him under these circumstances was not, and the agent prosecuted this person, or this person under these

theory, as it was contended, that he might thereby discover who had robbed the railroad company on another occasion); Staton v. Mason, 106 App. Div. 26, 94 N. Y. Supp. 417, (where a prosecution was instituted by one called the "credit clerk" of the defendant, but concerning the scope of whose duty no evidence at all appears).

[75] Markley v. Snow, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685; Singer Mfg. Co. v. Hancock, 74 Ill. App. 556; Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311; Daniel v. Atlantic Coast L. R. Co., 136 N. C. 517, 48 S. E. 816.

The master is not liable for arrests or prosecutions by a servant "on his own responsibility only," even though his purpose was to promote his master's interest, e. g., to collect a debt due to the master. Emerson v. Lowe Mfg. Co., 159 Ala. 350, 49 So. 69.

[76] Larson v. Fidelity Mutual Life Assn., 71 Minn. 101, 73 N. W. 711, (prosecution instituted by an agent primarily to coerce payment of a claim upon which the agent was also liable).

In Kutner v. Fargo, 20 N. Y. Misc. 207, it was held that the master is not chargeable with the malice of his agent or servant in giving testimony upon a criminal proceeding.

[77] See post § 41.

[78] See ante § 38.

[79] See Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650; Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303; Hussey v. Norfolk, etc. R. R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312.

circumstances, merely to give expression to some actual malice of his own, the principal would not be liable.[80] In some cases, the time at which the prosecution was instituted may be material. The institution of proceedings at the time of the transaction may sometimes be deemed to be so closely incidental to the transaction, as to come within the scope of the authority to do it; while if the prosecution be delayed it can only be accounted for upon the ground that its purpose was to punish or to get revenge or simply to perform a public duty by bringing the offender to justice.[81] No one of these purposes would ordinarily be within the scope of the authority, and the second one, which is the only one here pertinent, would obviously not be within its scope.

§ 42. ———. ASSAULTS.—The cases in which the master can be held liable for assaults committed by his servant, upon the ground that the assault was committed within the scope of the employment, are not very numerous. The cases in which the master owes a special duty of protection, as in the case of the carrier of passengers and others similarly situated, stand upon special ground, and are separately considered.[82] They do not usually rest merely upon the doctrine of *respondeat superior*. Where the master confides to the servant the performance of a duty which involves the exercise of force and the servant is put in a position where he must determine when the force is to be exercised, and to what degree, the master will be liable though the servant mistakes the occasion or uses the force to an excessive degree.[83] So, though the master may not

[80] See Larson v Fidelity Mutual Life Assn., 71 Minn. 101, 73 N. W. 711; Carter v. Howe Machine Co., 51 Md. 290; Wallace v. Finberg, 46 Tex. 35.

[81] See Allen v. London, etc. Ry. Co., L. R. 6 Q. B. 65, (where the court refers to "a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, or an act done for the purpose of punishing the offender for that which has already been done"); Carter v. Howe Machine Co., 51 Md. 290; Travis v. Standard L. & A. Ins. Co., 86 Mich. 288, 49 N. W. 140; Markley v. Snow, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685; Tolchester Beach Imp. Co. v. Steinmeyer, 72 Md. 313, 20 Atl. 188; Gillett v. Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653; Daniel v. Atlantic Coast L. R. Co., 136 N. Car. 517, 48 S. E. 816.

[82] See § 4.

[83] "If the master give an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable." Howe v. Newmarch, 12 Allen (Mass.) 49.

This doctrine is constantly applied in a great variety of cases against railroad companies which have authorized their servants to eject or remove persons who do not pay their fare or comply with other regulations of the company, or persons who trespass upon the vehicles or premises of the company. These cases are almost too numerous to mention, but among them see: Golden v. Northern Pac. Ry. Co., 39 Mont. 435, 104 Pac. 549; Chicago, etc., Ry. Co. v. Kerr, 74 Nebr. 1, 104 N. W. 49; Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; M. & O. R. R. Co. v. Seales, 100 Ala. 368, 13 South. 917; Kansas City, etc., R. Co. v. Kelly, 36 Kan. 655,

have contemplated the exercise of force, still if he sends his servant to perform an act which is immediately and directly likely to result in the exercise of force by the servant, as where resistance to the act is reasonably to be anticipated, the master will be liable if, in a conflict which ensues, the servant is guilty of illegal or excessive force.[84] Aside from cases of this nature, the instances must be rare

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14 Pac. 172; Marion v. Chicago, etc., R. Co., 64 Ia. 568, 21 N. W. 86; St. Louis, etc., R. Co. v. Pell, 89 Ark. 87, 115 S. W. 957.

Within the same principle are cases similar to Barden v. Felch, 109 Mass. 154. In that case the defendant entered on land to which both he and the plaintiff claimed title. The defendant took with him his servant and directed the servant to plough the land and maintain possession by force. The servant injured the plaintiff in a conflict which ensued over the possession. The court held the defendant liable for the injury, even if the servant used more force than the master authorized him to use.

See also Rogahn v. Moore Mfg. Co., 79 Wis. 573, 48 N. W. 669, where the foreman of the defendant's works discharged an employee and seriously injured him while forcibly ejecting him from the works. The court held that the authority vested in the foreman to discharge impliedly vested in him the power to eject a discharged employee. Having that power the defendant is liable if his servant uses excessive force in the execution of it.

Also, Canfield v. C. R. I & P. Ry. Co., 59 Mo. App. 354, where the defendant had employed a servant to prevent telegraph operators, who were on a strike, from persuading the operators in the employ of the defendant from joining the strike, and such servant had viciously assaulted plaintiff, one of the striking operators, while plaintiff was in the company's offices talking to the operator. The company was held liable for the assault.

In Houston, etc. Ry. Co. v. Bell, 73 S. W. 56 (Tex. Civ. App.), the defendant company was held liable for an assault committed by a freight agent in an altercation which grew out of rough handling of freight by plaintiff, where it appeared that the servant's duties included the protecting of freight.

In Alton Ry. and Illuminating Co. v. Cox, 84 Ill. App. 202, a care-taker of a park owned by defendant ordered plaintiff to leave the park. The plaintiff started out, and a controversy arose as to the keeper's authority to put him out of the grounds. In the controversy and physical combat which followed the keeper threw stones at the plaintiff and struck him. The master was held liable. See also Johnson v. C., R. I. & P. Ry. Co., 58 Ia. 348, 12 N. W. 329.

In Lesch v. Great Northern Ry. Co., 93 Minn. 435, 101 N. W. 965, a watchman authorized to search for stolen property, brutally conducted a search and seriously frightened plaintiff. The defendant was held liable.

See also Griffith v. Friendly, 30 Misc. 393, 62 N. Y. Supp. 391; Oakland City Agricultural Society v. Bingham, 4 Ind. App. 545, 31 N. E. 383.

[84] In McClung v. Dearborne, 134 Pa. 396, 19 Atl. 698, 19 Am. St. Rep. 708, 8 L. R. A. 204, the defendant sold organs under a plan whereby the defendant retained title, and the right of possession revested if installments were not paid. A collector for defendant obtained admission to the plaintiff's home through a fraudulent device, and discovered an organ, on which the defendant had such a claim for unpaid installments, in the possession of plaintiff, who had purchased the organ from the original buyer. The defendant instructed this collector to take possession of this organ if he could get it peaceably and without assaulting anyone. The collector assaulted the plaintiff in his effort to get possession of the organ. The court held the defendant liable.

For a case very similar in its facts, except that the master did not caution the servant not to commit an assault, see Ferguson v. Roblin, 17 Ont. 167; also, O'Connell v. Samuel, 81 Hun (N. Y.) 357, 30 N. Y. Supp. 889; see also Dyer v. Munday, [1895] 1 Q. B. D. 742. Peddie v. Gally, 109 App. Div. 178, 95 N. Y. Supp. 652, is put on the same ground, although the inference of authority does not seem to the present writer so obvious as it did to the court.

in which the exercise of personal violence can be regarded as within the scope of the employment.

§ 43. ———. The servant's act in punishing persons who annoy him in the performance of the service, or who interfere with or injure the master's property, or his act in using personal violence as a means of coercing the performance of contracts or the payment of debts due the master, can very seldom be regarded as within the scope of the employment.[85] *A fortiori* will this be true where the

[85] In the following cases the master was held not liable: Dolan v. Hubinger, 109 Iowa 408, 80 N. W. 514 (where a motorman threw a stone at boys who had placed obstructions on the track and struck the plaintiff, one of the boys); Rudgeair v. Reading Traction Co., 180 Pa. St. 333, 36 Atl. 859 (where a motorman left a car and struck the driver of a team which was on the track ahead of him); Lynch v. Florida, etc., Ry. Co., 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 810 (where a station agent and his father struck and injured plaintiff in an altercation arising from a personal quarrel, which quarrel had its inception in a dispute over a business transaction of the plaintiff with the defendant railroad); Georgia Railroad & Banking Co. v. Wood, 94 Ga. 124, 21 S. E. 288, 47 Am. St. Rep. 146 (where a brakeman threw a stone at a boy who had been jumping on the train, and struck the plaintiff, a by-stander); Guille v. Campbell, 200 Pa. 119, 49 Atl. 938 (where a servant of defendant who was engaged in handling bales of cotton, waved an iron hook, furnished by defendant to facilitate the handling of the cotton, to frighten boys who were playing on the bales; the hook slipped from his hand and struck plaintiff); Williams v. Pullman Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512 (where a porter of defendant violently assaulted the plaintiff who had stepped from the day coach into the sleeper operated by defendant to ask permission to use the toilet accommodations therein); Fairbanks v. Boston Storage Warehouse Co., 189 Mass. 419, 75 N. E. 737, 109 Am. St. Rep. 646 (where an elevator operator employed by defendant struck the plaintiff, without provocation, while the plaintiff was in defendant's warehouse looking after his goods that were stored there); Brown v. Boston Ice Co., 178 Mass. 108, 59 N. E. 644, 86 Am. St. Rep. 469 (where the driver of defendant's ice wagon left the company's ax on the sidewalk while he delivered ice to a house; upon returning he found that plaintiff, a boy, had broken it, and the driver struck him to punish him for the act); Johanson v. Pioneer Fuel Co., 72 Minn. 405, 75 N. W. 719 (where an employee in charge of a coal yard accused the plaintiff of attempting to get more coal than he was entitled to, and upon plaintiff denying it, became enraged and beat plaintiff); Campbell v. Northern Pacific Ry. Co., 51 Minn. 488, 53 N. W. 768 (where a surgeon employed by defendant railroad assaulted and injured the plaintiff, an assistant, while both were in a hospital performing their respective duties); Walker v. Hannibal, etc., Ry. Co., 121 Mo. 575, 26 S. W. 360, 42 Am. St. Rep. 547, 24 L. R. A. 363 (where a baggageman threw drills out of his car which struck plaintiff, which drills the baggageman was carrying gratuitously and without authority from the defendant); Collette v. Rebori, 107 Mo. App. 711, 82 S. W. 552 (where a debtor called to see about a bill he claimed to have paid, and a servant of the defendant who was authorized to collect, assaulted him in an altercation that followed); Feneran v. Singer Mfg. Co., 20 App. Div. 574, 47 N. Y. Supp. 284 (where an agent of defendant, authorized to collect installments but directed not to re-take property, injured plaintiff in an attempt to re-take property); Meehan v. Morewood, 52 Hun (N. Y.) 566, 5 N. Y. Supp. 710 (where the foreman of the defendant's teahouse assaulted the plaintiff, a truckman who was getting a load of tea, because the plaintiff refused to take a chest he thought was in bad order); Kennedy v. White, 91 App. Div. 475, 86 N. Y. Supp. 852 (a janitor employed by defendant occasionally drove away unruly boys from about the premises; on one such occasion the boys who were disturbing him ran away at his approach, and looking across the street he saw plaintiff, who was not and had not been misconducting himself, and threw a stick at him which struck and injured him); Wagner v. Haak, 170 Pa. St. 495, 32 Atl. 1087 (where defendant told his

violence is resorted to for the purpose of coercing the performance of that in which the servant was primarily interested rather than the master.[86] It is true that expressions indicating a wider liability are sometimes to be found. Thus in a case in Wisconsin[87] where the servant who was a barkeeper had made an assault upon one of his master's patrons, for the purpose, as it was contended, of coercing payment for liquors which he had purchased, the court said: "If B (the servant) committed the assault for the purpose of collecting payment of his master's liquor, he was within the scope of his employment. It was his method of performing the duty delegated to him, and, although the method may not have been either authorized or even contemplated,—nay, although it may have been expressly prohibited,—yet the master is liable for the damages caused thereby, provided he has entrusted to the servant the duty he was attempting to perform." Unless there is something peculiar about the particular business here involved, or unless the court deemed the case to fall within the principle of those in which a special duty of protection

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lessees of a quarry to tear down a fence erected by plaintiff, and "he would stand by them," and the lessees struck and beat plaintiff when he resisted); Benton v. Hill Mfg. Co., 26 R. I. 192, 58 Atl. 664 (where an operator of defendant threw a sharp piece of iron and struck the plaintiff, a child, who was annoying such operator by watching him work); Waaler v. Great Northern Ry. Co., 18 S. D. 420, 100 N. W. 1097, 70 L. R. A. 731 (where the employees of defendant were directed to erect a snow fence on land belonging to plaintiff's employer, and the plaintiff was directed by his employer to remonstrate, whereupon he was set upon and beaten by defendant's employees); Ware v. Barataria etc. Canal Co., 15 La. 169, 35 Am. Dec. 189 (where a lock-keeper on a canal assaulted the plaintiff under the pretext that the latter had not paid the toll); Kaiser v. McLean, 20 App. Div. (N. Y.) 326, 46 N. Y. Supp. 1038 (a servant employed to light lamps and guard them on an elevated railroad structure, threw stones at plaintiff, which caused plaintiff to run in front of an approaching train; the court held the servant had no authority to assault anyone.

[86] In McDermott v. American Brewing Co., 105 La. 124, 29 South 498, 83 Am. St. Rep. 225, 52 L. R. A. 684, the defendant company had drivers in its employ who worked on this basis: the driver was to deliver beer to customers and collect upon delivery; and if the driver failed to collect, the company held him, personally, liable for the amount. A driver had delivered beer one day to a saloon but failed to collect, whereupon the company charged him for the amount. The next day the driver returned to the saloon, where plaintiff was in charge. The driver demanded the price of the beer or its return. Upon the plaintiff's refusal to do either, the driver committed an assault upon him. The court held that the defendant company was not liable for the assault.

In Steinman v. Baltimore Antiseptic Laundry Co., 109 Md. 62, 71 Atl. 517, the same result was reached in a case involving similar facts.

[87] Bergman v. Hendrickson, 106 Wis. 434, 82 N. W. 304 80 Am. St. Rep. 47.

Compare McDermott v. American Brewing Co., 105 La. 124, 29 So. 498, 83 Am. St. Rep. 225, 52 L. R. A. 684, supra. See also McClung v. Dearborne, 134 Pa. 396, 19 Atl. 698, 19 Am. St. Rep. 708, 8 L. R. A. 204; O'Connell v. Samuel, 81 Hun. (N. Y.) 357, 30 N. Y. Supp. 889; Peddie v. Gally, 109 App. Div. 178, 95 N. Y. Supp. 652; Ferguson v. Roblin, 17 Ont. 167.

Language very similar to that of the Wisconsin court is found in the opinion of Vann, J., in Nowack v. Metropolitan St. Ry. Co., 166 N. Y. 433, 60 N. E. 32, 82 Am. St. Rep. 691. With deference, the implications of his language are too wide.

is supposed to exist (which seems probable from the cases cited), it must be thought that the rule here laid down is wider than sound principle or the authorities generally will justify. It surely cannot be true that because the master has entrusted to a servant the performance of a duty, the master can be held responsible for whatever method the servant may adopt in attempting to perform it.

§ 44. ———. SHOOTING.—The question whether a master can be held responsible for the shooting of a person by a servant whom the master has placed in charge of property, is a question which must depend upon a great variety of circumstances. The master may undoubtedly authorize the use of force under such circumstances as to be liable even for so extreme an application of it.[88]

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[88] In Letts v. Hoboken Ry. etc. Co., 70 N. J. L. 358, 57 Atl. 392, the plaintiff's petition alleged that defendant's watchman, while executing his authority by removing the plaintiff from the defendant's premises, shot and injured the plaintiff. The court held the petition good on demurrer, saying: "Authority, given by the master to his servant, to eject trespassers from the former's premises, charges the master with liability for the act of the servant in using excessive or inappropriate force in removing one who was a trespasser."

In Fraser v. Freeman, 56 Barb. (N. Y.) 234, in which the defendant was in a dispute with the plaintiff's intestate over the right to use the basement of a building occupied by defendant. The defendant took two servants, both armed to defendant's knowledge, with the declared intention of "fighting it out" with plaintiff's intestate. The plaintiff's intestate offering resistance, the servant of defendant killed him wantonly in the melee that followed. The master was held liable for the servant's acts.

In Haehl v. Wabash Ry. Co., 119 Mo. 325, 24 S. W. 737, a watchman of defendant, employed on a bridge with authority to keep trespassers off, shot and killed the plaintiff's intestate, while he was trespassing on the bridge, although the evidence fails to show any personal ill will held by the servant against the trespasser. The court held the defendant liable.

In Magar v. Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038, the defendant employed a watchman to guard his game preserve. The watchman shot the plaintiff, who was poaching thereon. The court held that to render the defendant liable the shooting must have been done by the watchman while acting in the scope of his employment, and whether it was so done is a question for the jury to determine.

In Southern Ry. Co. v. James, 118 Ga. 340, 45 S. E. 303, 63 L. R. A. 257, the railway company hired a watchman to arrest tramps who were stealing rides. This watchman arrested plaintiff and was taking him to the jail when the plaintiff sought to escape by running away. The watchman shot him to stop him. The company was held liable.

In Savannah Electric Co. v. Wheeler, 128 Ga. 550, 58 S. E. 38, 10 L. R. A. (N. S.) 1176, a drunken street car conductor refused to give a passenger change, and when requested for it, drew his revolver. The conductor attempted to shoot the passenger, but the passenger so deflected his aim as to cause the bullet to go wide, and it struck and killed a passer-by on the street. The company was held to be responsible for such acts of the conductor, and to be liable for the death of the pedestrian.

See also Deck v. Baltimore, etc., R. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399.

In Conchin v. El Paso & S. W. R. Co., — Ariz. —, 108 Pac. 260, the watchman, with a revolver furnished by defendant, shot toward plaintiff, intending to frighten him away only, and hit him. Plaintiff was a technical trespasser. The defendant was held liable for the wanton act.

In Jones v. Railroad, 150 N. C. 473, 64 S. E. 205, plaintiff was climbing upon a

Under familiar principles he may be liable where, having authorized the servant to use some force, the servant has used excessive force. The mere fact however that the servant is put in charge of property will not justify him in shooting any one who interferes with it, and the master will certainly not be liable where the servant shoots simply to give vent to his own personal malice or resentment, and certainly not in any case in which the shooting had no connection with or relation to the act which the servant was authorized to perform.[89]

§ 45. ———. SLANDER AND LIBEL.—The principal or master, whether individual, corporate or partnership, may also be held liable in many cases for the publication or utterance of a libel or slander by his servant or agent. In the case of libel, where the publication is in the ordinary course of business and involves no other malice or ill will than that inferred from the unjustifiable publication of the derogatory matter, the cases holding the principal liable are now so

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freight car. The flagman told him to come on up, but plaintiff turned to run, when the flagman shot him. The jury, in answer to a specific instruction, said the agent was not acting within the scope of employment, yet gave verdict for plaintiff. Held, It was error to enter judgment for plaintiff.

[89] In Lytle v. Crescent News & Hotel Co., 27 Tex. Civ. App. 530, 66 S. W. 240, the plaintiff disputed with the waiter at defendant's restaurant over a matter of change. The plaintiff called waiter an opprobrious name as he was leaving the restaurant. The waiter pursued and shot him. The master was held not liable.

In Turley v. B. & M. Ry. Co., 70 N. H. 348, 47 Atl. 261, a servant of defendant, whose duty it was to trim switch-lamps, shot plaintiff, a member of a gang which he was trying to drive from the yards. It was no part of his duty to clear the yards of trespassers. The defendant was held not liable.

In Grimes v. Young, 51 App. Div. 239, 64 N. Y. Supp. 859, a night watchman was furnished with a revolver by defendant, his master, and instructed to use it only in self defense, or to fire in the air to scare trespassers. The watchman killed a boy wantonly, who was not on defendant's property nor interfering in any way with it. The defendant was held not liable.

In Sandles v. Levenson, 78 App. Div. 306, 79 N. Y. Supp. 959, a watchman seized and held a boy who had gone into defendant's yards (guarded by the watchman) for a ball. While so holding the boy the watchman, for some purpose, discharged his revolver in the air, and the bullet accidentally struck plaintiff. The defendant was held not liable.

In Holler v. Ross, 68 N. J. L. 324, 53 Atl. 472, 96 Am. St. Rep. 546, 59 L. R. A. 943, the defendant hired a watchman to guard his goods stored on a wharf belonging to another. The watchman saw three men prowling about the wharf and ordered them to halt. They refused and he shot them. The gun used was not furnished by the defendant. The defendant was held not liable.

In Golden v. Newbrand, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257, an armed watchman, employed by defendant to protect his property, shot and killed an intoxicated man who had just been engaged in a disturbance with another, but who was retreating from the defendant's property when killed. The defendant was not liable.

In Belt Ry. Co. v. Barucki, 102 Ill. App. 642, a watchman shot a trespasser; and the court held the mere employment of a watchman to guard premises and keep away trespassers, did not involve an authority to shoot trespassers; a fortiori, where the trespasser was actually leaving the premises, as in this case, when shot. The defendant was held not liable.

numerous as to require no discussion.[90] The principal is liable in such a case even though he was not personally present or aware of the publication, but had confided the conduct of the business to an agent.[91] The principal may also be liable for publications in the course of the business, even though actual malicious intention must be proved,[92] and he will be liable for a publication made in the course of the business and for the purpose of furthering the principal's interests even though it was the result of actual malice.[93] On the other hand, there could be no doubt that a servant or agent who merely took advantage of the opportunity afforded by his position, to libel others in order to gratify his own malice and ill-will, in matters in no way within the course of his employment, would not impose a liability upon his principal.[94]

§ 46. ——— With reference to slander, the case presents some differences of aspect. It is more easy to see, for example, that a principal or master, whose business is that of publishing, may be liable for defamatory publications by his servant or agent, than it is to see how liability for defamatory spoken words may arise in

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[90] See, for example, in the case of corporations: Hypes v. Sou. Ry. Co., 82 S. C. 315, 64 S. E. 395 [slander]; Rivers v. Yazoo & Miss. R. R. Co., 90 Miss. 196, 43 South. 471, 9 L. R. A. (N. S.) 931 (slander); Sawyer v. Norfolk & Sou. R. R., 142 N. C. 1, 54 S. E. 793, 115 Am. St. R. 716 (slander); Peterson v. Western U. Tel. Co., 65 Minn. 18, 67 N. W. 646 (libel); Philadelphia, etc., R. Co. v. Quigley, 62 U. S. (21 How.) 202 (libel); Washington Gas Light Co. v. Lansden, 172 U. S. 536 (libel); Hussey v. Norfolk & Sou. R. R. Co., 98 N. C. 34, 3 S. E. 923 (libel); Hardoncourt v. North Penn. Iron Co., 225 Pa. 379, 74 Atl. 243 (libel); Fogg v. Boston & Lowell R. R. Co., 148 Mass. 513, 20 N. E. 109 (libel); Howland v. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656 (libel); Rose v. Imperial Engine Co., 127 App. Div. (N. Y.) 885, 112 N. Y. S. 8, 195 N. Y. 515, 88 N. E. 1130 (libel); Fraternal Alliance v. Mallalieu, 87 Md. 97, 39 Atl. 93 (libel); Minter v. The Bradstreet Co., 174 Mo. 444, 73 S. W. 668 (libel).

For cases involving liability of partners for libel, see: Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Atlantic Glass Co. v. Paulk, 83 Ala. 404, 3 South. 800; Wheless v. Davis, (Tex. Civ. App.), 122 S. W. 929; Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073 (slander and libel); Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528.

That a partner is not liable for the slander of a co-partner, depending upon statute: Ozborn v. Woolworth, 106 Ga. 459, 32 S. E. 581; Hendricks v. Middlebrooks Co., 118 Ga. 131, 136, 44 S. E. 835.

For cases involving liability of individual principal or master for libel of agent or servant, see: Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392; Williams v. Fuller, 68 Neb. 354, 94 N. W. 118, 68 Neb. 362, 97 N. W. 246.

[91] See Storey v. Wallace, 60 Ill. 51; Dunn v. Hall, 1 Ind. 344; Andres v. Wells, 7 Johns. (N. Y.) 260, 5 Am. Dec. 267; Perret v. New Orleans Times, 25 La. Ann. 170.

[92] Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528 (a case involving liability of one partner for act of another); Bruce v. Reed, 104 Pa. 408.

[93] Pennsylvania Iron Works v. Voght Machine Co., (Ky.), 96 S. W. 551, 29 Ky. L. Rep. 861, 8 L. R. A. (N. S.) 1023 (a case of libelous letter written by the agent of a corporation in an endeavor to get business for his principal).

[94] See Washington Gas L. Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. ed. 543.

the conduct of a business in which publication is not an incident. Nevertheless such cases may exist,—the difficulty ordinarily being to find that the speaking was within the scope of the employment. In the case of corporate principals or masters, several text writers and some courts have held that there can be no liability for slander by a servant or agent, it being said that "there can be no agency to slander."[95] But this reasoning is not conclusive, and several courts have held that liability may exist in these cases if the speaking of the words was in the course of the employment,[96] though it must be said that, upon the latter point, there has been a tendency in some courts to overlook the distinction between acts done *in the course* of the employment and those done merely *during* the employment.

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[95] Odgers on Libel and Slander (1st Am. ed.) *368; Newell on Defamation (1st ed.) 361 [but see 2d ed. 376]; Townshend on Slander and Libel (2d ed.) § 265; Behre v. National Cash Reg. Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. R. 320; Singer Mfg. Co. v. Taylor, 150 Ala. 574, 43 So. 210, 9 L. R. A. (N. S.) 929 and Note, 124 Am. St. R. 90; Duquesne Distrib. Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. (N. S.), 955 (a partnership).

[96] Empire Cream Co. v. De Laval Dairy Co., 75 N. J. L. 207, 67 Atl. 711; Sawyer v. Norfolk, etc. R. Co., 142 N. C. 1, 54 S. E. 793, 115 Am. St. R. 716 and Note (defendant held not liable in this case because act not in course of employment); Redditt v. Singer Mfg. Co., 124 N. C. 100, 32 S. E. 392 (same); International Text Book Co. v. Heartt, 69 C. C. A. 127, 136 Fed. 129 (same); Rivers v. Yazoo, etc., R. Co., 90 Miss. 196, 43 So. 471, 9 L. R. A. (N. S.) 931 (a case which was decided upon the pleadings but which seems questionable upon the facts); Hypes v. Southern Ry. Co., 82 S. Car. 315, 64 S. E. 395.